STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DOCKET NO. EL11SB-63302
EEOC CHARGE NO. 17E-2013-00006

Charnelle Gilliard, and the Director of the NJ Division on Civil Rights, Complainants, v. Trane U.S. Inc., Respondent.	Administrative Action **FINDING OF PROBABLE CAUSE**

The Director of the New Jersey Division on Civil Rights (DCR), pursuant to N.J.S.A. 10:5-14 and attendant procedural regulations, hereby finds that probable cause exists to believe that a discriminatory practice has occurred in this matter in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -42.

On September 4, 2012, Charnelle Gilliard (Complainant) filed a complaint with the DCR alleging that her former employer, Trane U.S., Inc. (Respondent), discriminated against her based on gender, by firing her for taking medical leave for her pregnancy as prescribed by her doctor. Respondent denied the allegations of discrimination in their entirety. It asserted that Complainant[1] was discharged for being out of work without approval after she failed to provide sufficient medical documentation.

The DCR investigated the matter and found, for purposes of this disposition, that the relevant events are largely undisputed. Complainant is a Ewing Township resident who began

[1] The DCR Director hereby intervenes as a complainant pursuant to N.J.S.A. 13:4-2.2(e). However, for purposes of this finding, "Complainant" will refer only to Ms. Gilliard.

working for Respondent as an assembler in July 2010. Respondent, which describes itself as a business of Ingersoll Rand, operates a heating, ventilation, and air conditioning manufacturing plant in Trenton.

Following the instructions of her doctor who was providing pre-natal care, Complainant stopped working on or about May 15, 2012. On or about the same date, she applied to the New Jersey Department of Labor and Workforce Development (Department of Labor) for temporary disability benefits due to her pregnancy.[2] Respondent completed the employer's portion of the temporary disability application form on May 15, 2012. The only question on that form related to the employee's disability asks for "Reason for separation from work if other than disability," and Respondent wrote simply, "OB."

On May 16, 2012, Complainant's OB/GYN, Dr. Azubuike Ezeife, completed Respondent's two disability forms, i.e., a *Medical Certificate* and an *Attending Physician's Statement of Work Capacity and Impairment.* On the Medical Certificate, he wrote that he had been treating Complainant since October 27, 2011, that he last treated her on May 11, 2012, and that she was unable to work as of May 15, 2012. He gave her diagnosis as "prenatal care, delivery," with an expected delivery date of June 12, 2012, and a return-to-work date of July 24, 2012. Where the form asked for an International Diagnosis Code (ICD), he wrote, "V22.2" (i.e., pregnant state, incidental) and "650," (i.e., normal delivery).

On the Attending Physician's Statement, Dr. Ezeife wrote that Complainant should stop working by May 15, 2012, that her expected delivery date was June 12, 2012, and that she was expected to return to work on July 24, 2012. He gave her primary diagnosis as "prenatal care," the secondary diagnosis impacting work as "delivery," and in the section of the form requesting "medical signs and symptoms," he indicated that the symptoms were "pregnancy" and that the

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[2] That application was subsequently approved and Complainant informed DCR that she received her first temporary disability check in the mail about two weeks later.

physical examination showed "pregnancy 35+ weeks." Dr. Ezeife initially left blank the section asking for a rationale for recommending disability leave. However, he later added the following rationale, "Followed State of New Jersey Regulations," and then re-submitted the form to Respondent. It appears that he submitted the revised form (which was still dated May 16, 2012) after Complainant gave birth because the form also indicated that Complainant had been admitted to the hospital on June 8, 2012, and discharged on June 11, 2012.

Aon Hewitt (Hewitt) is a third-party benefits administrator that handles Respondent's employee benefits. On May 15, 2012, a Hewitt representative contacted Dr. Ezeife's office requesting a medical certification regarding Complainant's request for disability leave. On May 18, 2012, Dr. Ezeife told the Hewitt representative that he had advised Complainant to stop working on May 15, 2012.

On May 24, 2012, a Hewitt case manager contacted Dr. Ezeife's office for more information. A nurse in Dr. Ezeife's office told the Hewitt case manager that there were no complications with Complainant's pregnancy, that Complainant was unable to work because of her pregnancy, and that the pregnancy itself was the basis for Complainant's disability claim.

In a May 29, 2012 letter, Respondent informed Complainant that because it had not received a satisfactory explanation for her absence from work since May 13, 2012, her absence was unapproved. The letter stated that if Complainant did not provide a satisfactory explanation for her absence by June 5, 2012, her employment would be terminated. Because Respondent did not receive any additional information by that date, Hewitt contacted Dr. Ezeife's office again on June 6, 2012. A nurse explained that she did not believe that a medical reason other than pregnancy was needed to support Complainant's disability leave, and that Dr. Ezeife was following New Jersey regulations.

On June 26, 2012, Complainant contacted Hewitt. She said that she gave birth on June 9, 2012, and asked why Respondent's letter stated that her disability leave was not approved. The Hewitt representative informed her that her physician did not provide a medical reason for her disability leave. Complainant told DCR that she did not know what type of additional information she or her physician could have provided to justify her eligibility for pregnancy leave.

DCR interviewed Hewitt representatives Gail Kuzia and Carrie Bachand, who stated that they followed Respondent's standards in deciding that Complainant's physician did not provide enough information to show that she could not work because of her pregnancy. Kuzia and Bachand stated that Respondent, not Hewitt, made the decision to terminate Complainant's employment.

In the answer to the complaint, Respondent asserted that when Dr. Ezeife's office stated that it did not believe that a medical reason other than pregnancy was needed to support Complainant's disability leave, and that Dr. Ezeife was following New Jersey regulations, it understood Dr. Ezeife to be referring to temporary disability regulations that permit pregnant employees to receive disability benefits up to four weeks before their due date, but that Respondent interpreted this to require medical information showing that the patient had a disability at the time leave commenced. Respondent asserted that because it did not receive any additional information from Complainant, it terminated her employment on June 15, 2012, retroactive to May 13, 2012. It does not appear that Respondent issued a termination notice other than the May 29, 2012 letter stating that Complainant was absent without a satisfactory explanation.

During the investigation, DCR reviewed Respondent's protocols for approving disability leaves of absence. Respondent's Business Rule for FMLA leave provides that an employee's approval for short term disability benefits will be treated as a proxy approval for the disability component of FMLA leave. Respondent's FMLA policy also provides that where there are doubts

about the sufficiency of the initial medical certifications regarding a disability, Respondent may send the employee for a second medical opinion at the employer's expense.

At the conclusion of an investigation, DCR is required to determine whether "probable cause exists to credit the allegations of the verified complaint." N.J.A.C. 13:4-10.2. "Probable cause" for purposes of this analysis means a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief that the [LAD] has been violated." Ibid. A finding of probable cause is not an adjudication on the merits, but merely an initial "culling-out process" whereby the DCR makes a preliminary determination of "whether the matter should be brought to a halt or proceed to the next step on the road to an adjudication on the merits." Frank v. Ivy Club, 228 N.J. Super. 40, 56 (App. Div. 1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S.Ct. 799; Sprague v. Glassboro State College, 161 N.J. Super. 218, 226 (App. Div. 1978).

The "clear public policy of this State is to eradicate invidious discrimination from the workplace." Alexander v. Seton Hall, 204 N.J. 219, 228 (2010). To that end, the LAD was enacted as remedial legislation to root out the "cancer of discrimination." Hernandez v. Region Nine Housing Corp., 146 N.J. 645, 651-52 (1996). Our courts have adhered to the Legislative mandate that the LAD be "liberally construed," N.J.S.A. 10:5-3, by consistently interpreting the LAD with a "high degree of liberality which comports with the preeminent social significance of its purposes and objects." Andersen v. Exxon Co., 89 N.J. 483 (1982); cf. Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501, 519 (App. Div.) (noting LAD's protections are broader than other anti-discrimination statutes), certif. den'd, 170 N.J. 211 (2001).

The LAD prohibits sex discrimination in all areas (employment, labor organizations, credit and contracting, places of public accommodations, and housing/real estate), and courts have interpreted sex discrimination to include discrimination based on pregnancy. Wolpert v. Abbott

Laboratories, 817 F. Supp. 2d 424 (3rd Cir. 2011), Castellano v. Linden Bd. of Ed., 79 N.J. 407 (1979)(holding that disallowing sick leave for disability caused by pregnancy discriminates against women, since sick leave is available for disabilities due to illness or injury), mod. on other grounds, 79 N.J. 407, 412-13 (1979); McConnell v. State Farm Mut. Ins. Co., 61 F. Supp.2d 356 (1999); Leahey v. Singer Sewing Co., 302 N.J. Super. 68 (Law Div. 1996).[3]

The Appellate Division in Castellano held that although a normal pregnancy does not meet the strict definition of an illness or injury, an employer's refusal to permit an employee to use accumulated sick leave for absences related to pregnancy or childbirth would constitute sex discrimination in violation of the LAD. Castellano, 158 N.J. Super. 350, 362 (App. Div. 1978).[4] The court wrote:

> We are convinced that to deprive a pregnant employee of sick leave benefits for an absence occasioned by childbirth does indeed constitute discrimination on account of sex . . . The [Respondent]'s concept that pregnancy is not an illness or injury in the usual sense of those words and thus must be excluded from sick leave benefits is far too restrictive and literal and not in accord with the clearly enunciated policy of this State against discrimination on account of sex. Sick leave benefits are intended to alleviate economic losses resulting from inability to work because of disability. This salutary purpose would not be furthered by excluding pregnancy-related absences merely because the condition may not be an illness by strict definition.

Id. at 361-62. In reaching that conclusion, the court found it "worthy of comment" that the New Jersey Temporary Disability Benefits Law, N.J.S.A. 43:21-29, stated that for the purposes of determining eligibility for disability benefits, pregnancy could be deemed a disability during the four weeks immediately preceding the expected birth of a child and the four weeks immediately

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3 The LAD was recently amended to expressly list pregnancy as a prohibited basis for discrimination, and to require employers to provide women who are pregnant with reasonable accommodation in the workplace based on the advice of the woman's doctor unless the accommodation would pose an undue hardship on the operations of the employer. See P.L. 2013, c. 220. In making this determination, the Director is applying the law as it existed at the time of the events of this matter.

4 In affirming the Appellate Division's decision, the New Jersey Supreme Court noted that it agreed substantially with the ruling and underlying reasoning of the Appellate Division. Castellano v. Linden Bd. of Ed., supra, 79 N.J. at 410.

following the termination of the pregnancy. See Castellano, supra, 158 N.J. Super. at 362 (citing N.J. Bell Tel. Co. v. Board of Educ. of the Twp of Board of Review, 78 N.J. Super. 144 (App. Div. 1963)).

In 1980, the section of the New Jersey Temporary Disability Benefits Law limiting disability benefits for pregnancy to the four weeks before and the four weeks after the projected delivery date was deleted. However, as the Appellate Division explained, that statute was changed "not because the presumption of disability for the specified period is unjustified but rather because the provision restricted benefit eligibility for disability associated with normal pregnancy . . . to eight weeks, while all other claimants may collect for up to 26 weeks." See Hynes v. Board of Educ. of the Twp of Bloomfield, 190 N.J. Super. 36, 40 (1983) (citing N.J. Att'y Gen. Formal Op. 2-1979, 103 N.J.L.J. 198 (Mar. 8, 1979)). In other words, the change was intended to broaden--rather than limit--the scope of disability due to a normal pregnancy. Hynes, supra, 190 N.J. Super. 36, 40-42.

Invalidating the limit of four weeks before and four weeks after delivery was based on then-recently enacted amendments to Title VII, known as the Pregnancy Discrimination Act, which among other things defined sex discrimination in the workplace to include pregnancy discrimination. N.J. Att'y Gen. Formal Op. 2-1979, supra, 103 N.J.L.J. 198. The AG Opinion also noted that because disabilities associated with pregnancy complications were at that time already treated the same as other disabilities, the AG's determination specifically addressed normal pregnancies.

Although there is no longer a New Jersey statute or regulation that limits when a pregnant woman will become eligible for temporary disability benefits, the presumption that a woman experiencing a normal pregnancy becomes disabled four weeks before her expected delivery date has not been eliminated. The Department of Labor's website tells applicants for temporary disability benefits:

> For a normal pregnancy, benefits are usually payable for up to four (4) weeks before the expected delivery date and up to six (6) weeks after the actual delivery date (provided that you have not worked during that time). A doctor may certify that you are disabled for a longer period if
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> - You experience specific complications related to pregnancy
> - You undergo a Cesarean section
> - You have another simultaneous disability
> - You are physically unable to do your regular job.

Thus, although the presumption that a woman's disability begins four weeks before her expected due date is not in New Jersey regulations, as Complainant's physician indicated, the State agency charged with determining eligibility for temporary disability benefits continues to apply that presumption and informs the public that it will do so. In this light, Complainant's physician recommendation was consistent with the current practice of the Department of Labor.

Based on the above, the investigation found sufficient evidence to show that Respondent discriminated against Complainant based on sex. First, Respondent treated Complainant less favorably than employees with other types of disabilities. Respondent's Business Rule for FMLA leave provides that an employee's approval for short term disability benefits will be treated as a proxy approval for the disability component of FMLA leave. Complainant's application for temporary disability benefits was approved without any problems. Respondent failed to rely on this determination, despite its stated practice of treating temporary disability determinations as proxy approval of leaves of absence. Regardless of whether Complainant was actually eligible for FMLA leave, Respondent has provided no reason for not similarly treating Complainant's approval for temporary disability benefits as a satisfactory explanation for her absence from work.[5] Respondent's FMLA policy also provides that where there are doubts about the sufficiency of the initial medical certifications regarding a disability, it may send the employee for a second medical

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[5] DCR does not enforce the FMLA, and cannot make a determination as to whether Complainant was eligible for job-protected leave under that law. It appears that although she worked for Respondent for about two years, she was laid off twice, and those layoff periods may have had some impact on her FMLA eligibility.

opinion at the employer's expense. Respondent has not explained why, if it doubted Dr. Ezeife's conclusion, it did not send Complainant for an independent medical assessment.

Second, Respondent refused to accept Complainant's treating physician's determination that the normal but advanced stage of her pregnancy alone made her unable to perform her job. The physician's statement linked his assessment of her inability to work to the fact that she had passed the 35th week of her pregnancy. Because he had treated Complainant throughout her pregnancy, and had last treated her only a few days before completing the disability forms, his opinion is entitled to considerable weight. Because only women become pregnant, Respondent's demand that the treating physician provide additional information or evidence to justify Complainant's inability to perform her job during the final weeks of pregnancy constitutes sex discrimination.

In sum, Respondent's failure to take other actions it normally used to assess an employee's ability to work, as contemplated by its short term disability and FMLA policies, is evidence of differential treatment based on pregnancy. This is sufficient to show a "reasonable ground of suspicion supported by facts and circumstances strong enough in themselves to warrant a cautious person in the belief" that Respondent subjected Complainant to sex discrimination in violation of the LAD. N.J.A.C. 13:4-10.2. In addition, Complainant's treating physician provided Respondent with sufficient information to show that she was absent from work due to the advanced stage of her pregnancy. As only women become pregnant, Respondent's termination of Complainant's employment based on a purported failure to provide a satisfactory explanation for her absence supports a reasonable suspicion that Respondent discriminated against Complainant based on gender.

WHEREFORE, it is on this 27 day of JAN, 2014, determined and found that PROBABLE CAUSE exists to credit the allegation of sex discrimination due to pregnancy, and it is further

ORDERED that the DCR Director hereby intervenes as a complainant pursuant to N.J.S.A. 13:4-2.2(e).

Craig Sashihara, Director
NJ DIVISION ON CIVIL RIGHTS